No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SHANE AUSTIN PETERS

Petitioner,

v.

ERIC ARNOLD, Warden, California State Prison, Solano

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
For the Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

VOLUME I

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APPENDIX INDEX

Volume I

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHANE AUSTIN PETERS, Petitioner-Appellant, v. ERIC ARNOLD, Warden, Respondent-Appellee.	No. 17-17485 D.C. No. 2:15-cv-00586-JKS Eastern District of California, Sacramento ORDER

Before: THOMAS, Chief Judge, PAEZ, Circuit Judge, and FEINERMAN,* District Judge.

On Petitioner-Appellant's motion, issuance of the mandate is stayed for ninety days from this date pending Petitioner-Appellant's filing a petition for a writ of certiorari to the United States Supreme Court.

* The Honorable Gary Feinerman, United States District Judge for the Northern District of Illinois, sitting by designation.

Tab 2

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UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

SHANE AUSTIN PETERS, Petitioner-Appellant, v. ERIC ARNOLD, WARDEN, CALIFORNIA STATE PRISON, SOLANO, Respondent-Appellee.	)	CASE No. 17-17485 Dist. Ct. No. 2:15-cv-00586-JKS

MOTION TO STAY THE MANDATE PENDING FILING OF A PETITION FOR A WRIT OF CERTIORARI

Counsel for appellant, Shane Peters (hereafter "counsel"), hereby moves the Court to issue an order to stay the issuance of the Mandate in this

matter for 90 days pending the filing of a petition for writ of certiorari with the U.S. Supreme Court.

This motion is brought pursuant to the provisions of FRAP Rule 41(d)(2) and Ninth Circuit Court of Appeals General Order 4.6(c).

The motion is brought on the grounds that the filing of a petition for writ of certiorari to the U.S. Supreme Court will present substantial questions and there is good cause for a stay. The petition for writ of certiorari will not be frivolous and will not be filed for purposes of delay.

Counsel has not previously applied for the order sought by this motion.

Appellant Shane Peters is not on bail. He is currently serving a determinate term of 19 years in prison, plus a consecutive indeterminate term of 15 years to life in prison.

THE CERTIORARI PETITION WILL PRESENT SUBSTANTIAL QUESTIONS

I

A SUBSTANTIAL QUESTION IS PRESENTED UNDER THE AEDPA IN REGARDS TO A CONFLICT WITH DECISIONS FROM THE U.S. SUPREME COURT AND THE NINTH CIRCUIT IN *McDaniel v. Brown*, 558 U.S. 120, *McDonald v. Hedgpeth*, 907 F.3d 1212, AND *Johnson v. Montgomery*, 899 F.3d 1052

Appellant has previously asserted that the panel's decision in this matter regarding appellant's sufficiency of the evidence claims conflicts with the decisions of the U.S. Supreme Court and the Ninth Circuit Court of Appeals in *McDaniel v. Brown*, 558 U.S. 120 (2010), *McDonald v. Hedgpeth*, 907 F.3d 1212 (9th Cir. 2018), and *Johnson v. Montgomery*, 899 F.3d 1052 (9th Cir. 2018). (PR pp. 7, 17-19.)1/

The genesis of this conflict is appellant's arguments that under the holding of *In re Alexander L.*, 149 Cal.App.4th 605 (2007), "conclusory" "basis" or "background" evidence of the type presented by the prosecution gang expert in this case is insufficient to establish the elements of a Penal Code section 186.22(b)(1) charge. (AOB pp. 42-46.)

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1 "PR" refers to appellant's petition for rehearing filed in this matter on May 2, 2019.

"Dec." refers to this Court's Memorandum Decision in this matter on April 23, 2019.

"AOB" refers to Appellant's Opening Brief filed in this case.

"RB" refers to Respondent's Brief filed in this case.

"ARB" refers to Appellant's Reply Brief filed in this case.

"Opn." refers to the Opinion of the state Court of Appeal.

This Court is required to follow the holding of *Alexander L.* on this point of law in the instant case, because it constitutes state law pertaining to "the substantive elements" of a criminal street gang charge (*Coleman v. Johnson*, 566 U.S. 650, 655 (2012) [federal courts must look to state law for "the substantive elements of the criminal offense"]) and because federal habeas review of a sufficiency of the evidence claim is performed "with explicit reference to the substantive elements of the criminal offense as defined by state law" (*Jackson v. Virginia*, 443 U.S. 307, 324, fn. 16 (1979). (See also, *Bradshaw v. Richey*, 546 U.S. 74 (2005) [federal courts must follow state court's interpretation of state law]; and see, *McDonald v. Hedgpeth*, at 1222, citing *Johnson v. Montgomery*, at 1058 [conclusory expert testimony alone is insufficient to find an offense gang related].)

The Court's opinion in this matter cites to *Johnson v. Montgomery*, 899 F.3d 1052 and *McDaniel v. Brown*, 558 U.S. 120 in support of the proposition that appellant has argued that "the California Court of Appeal erred in interpreting state law." As has been previously explained in his Petition for Rehearing and in Appellant's Reply Brief, appellant has not argued that the state Court of Appeal erred in interpreting state law. (See, ARB pp. 14-17 [appellee's assertion that appellant has argued "misapplication of state law" is a *Straw man* supported by a *red hearing*].)

Appellant's argument has been that "basis" or "background" evidence is not admitted as independent proof of facts necessary to satisfy elements of a criminal gang charge. (*People v. Gardeley*, 14 Cal.4th 605, 619 (1996) [basis and background evidence have no evidentiary value other than to provide a foundation for the expert's testimony].)

What appellant has argued is that the evidence of collaborative activities or collective organizational structure in this case was insufficient under the holdings of *Alexander L, supra*, 149 Cal.App.4th 605, *People v. Williams*, 167 Cal.App.4th 983, 987 (2008), and *People v. Prunty*, 6 Cal.4th 59 (2015). This is so because the prosecution must prove collaborative activities or collective organizational structure by means other than conclusory, basis testimony elicited from a gang expert. (*Alexander L, supra*, 149 Cal.App.4th 605.)

Consistent with *McDonald v. Hedgpeth*, 907 F.3d at page 1222, footnote 4, appellant's reliance on *Alexander L.* here is "solely to define the elements of the gang enhancement, as *Jackson* requires," thereby demonstrating agreement with federal sufficiency of the evidence analysis. Appellant's arguments as to conclusory expert gang testimony under *Alexander L.* simply underscore the rule that federal habeas review of a sufficiency of the evidence claim is performed "with explicit reference to the

substantive elements of the criminal offense as defined by state law." (See, *Jackson v. Virginia*, at 324, fn. 16; and see, *Bradshaw v. Richey*, 546 U.S. 74.)

Moreover, *In re Alexander L.*, *People v. Williams*, and *People v. Prunty*, are "sufficiency of the evidence" cases pertaining to gang prosecutions and not "admissibility of evidence" cases. These cases do not concern themselves with the question of whether or not a gang expert's testimony was properly admitted at trial. *McDaniel v. Brown*, 558 U.S. 120 has currency only in the confines of "erroneous admission of evidence" cases under the AEDPA and is irrelevant to "sufficiency of the evidence" cases falling outside of the erroneous evidence admission arena. Appellant's argument is a "sufficiency of the evidence" argument not an "erroneous admission of evidence argument."

This Court is required to follow the holding of *Gardeley* on this point because it constitutes state law pertaining to "the substantive elements" of a criminal street gang charge. (*Coleman v. Johnson*, at 655; accord, *Bradshaw v. Richey*, 546 U.S. 74.) Conclusory basis and background evidence simply does not count as case specific evidentiary facts in the manner that appellee would have it count under the holding of *McDaniel v. Brown*, 558 U.S. 120. *McDaniel v. Brown* has never been expanded in any opinion to the point that

it contradicts the controlling effect of state court substantial elements case law.

In essence, this Court's decision conflates appellant's actual arguments that the evidence was insufficient to establish collaborative activities or collective organizational structure under California decisional law with the proposition that appellant has argued that the state Court of Appeal erred in interpreting state law. In the process, the Court's opinion runs directly contrary to the holdings from *McDonald v. Hedgpeth*, at page 1221, footnote 4 and *Johnson v. Montgomery*, at page 1059, footnote 1 to the effect that a federal habeas court must rely on California decisional law pertaining to the elements of the offense when evaluating sufficiency of the evidence.

The state Court of Appeal's decision in this matter is unreasonable because it is not in "harmony with," and is "discordant" with, the decisions in *Alexander L.*, *Gardeley*, *Williams*, and *Prunty*. (See, i.e., *Johnson v. Montgomery*, at p. 1059, fn. 1.) Conclusory, basis evidence simply does not enter into the calculation of the sufficiency of the evidence to support a gang charge. (*In re Alexander L.*, 149 Cal.App.4th 605; *People v. Gardeley*, at 619; *McDonald v. Hedgpeth*, at 1222, citing *Johnson v. Montgomery*, at 1058 [conclusory expert testimony alone is insufficient to find an offense gang related].)

Ultimately, this Court's opinion conflicts with the holding of the U.S. Supreme Court in *McDaniel v. Brown*, 558 U.S. 120 and exploits a susceptibility for *McDaniel v. Brown* to be interpreted in a manner that is contrary to the provisions of the AEDPA. In the process, the Court's opinion runs in contravention of the Ninth Circuit's holdings in *McDonald v. Hedgpeth*, at pages 1221 through 1222, & fn. 4 and *Johnson v. Montgomery*, at pages 1058 through 1059, & fn. 1. Therefore, the grant of a petition for writ of certiorari is necessary to resolve the conflict presented by this case under *McDaniel v. Brown*, *McDonald v. Hedgpeth*, and *Johnson v. Montgomery*.

For these reasons, appellant submits that a petition for writ of certiorari in this matter will present a substantial question and there is good cause to stay the Mandate.

II

A SUBSTANTIAL QUESTION IS PRESENTED UNDER THE AEDPA IN REGARDS TO A CONFLICT WITH DECISIONS FROM THE U.S. SUPREME COURT IN *Williams v. Illinois*, 567 U.S. 50, *Roviaro v. United States*, 353 U.S. 53 and *Banks v. Dretke*, 540 U.S. 668

Appellant has previously asserted that the panel's decision in this matter regarding appellant's confrontation and informant disclosure claims conflicts with the decisions of the U.S. Supreme Court in *Williams v.*

Illinois, 567 U.S. 50 (2012), *Roviaro v. United States*, 353 U.S. 53 (1957) and *Banks v. Dretke*, 540 U.S. 668 (2004). (PR pp. 8, 19-24.)

The Court's decision holds that the state Court of Appeal did not unreasonably apply established federal law in concluding that the trial court did not violate the Confrontation Clause by admitting expert testimony that was based in part on information from confidential informants. (Dec. p. 3.) The Court's decision additionally holds that appellant's claim regarding the trial court's preventing him from eliciting information identifying the confidential informants on cross-examination of the prosecution's expert is forfeited because he has failed to develop his argument or cite any authority for the proposition that the restriction was improper. (Dec. p. 4.) The Court holds further that the California Court of Appeal's decision is not an unreasonable application of *Roviaro v. United States*, 353 U.S. 53. (Dec. 4.)

Appellant respectfully submits that the Court's decision overlooks much of what appellant has argued on his appeal in regards to the constitutional violations concerning the informants.

Appellant has argued in the state trial court, the state Court of Appeal, and the Federal District Court that the prosecution gang expert relied on information provided by five confidential informants to form his expert opinions, and the trial court's failure to require disclosure of the identities of

the informants violated his Sixth and Fourteenth Amendment rights to confrontation, cross-examination, a fair trial, and due process of law. (HCPA pp. 20-28.)2/

Appellant's arguments also emphasize that the gang expert offered information obtained from the informants for the truth of the matter asserted, and the gang expert admitted that he had no personal knowledge of the information furnished by the informants, that he had not verified the information in any way, and did not know if it was accurate. (HCPA p. 20.)

In addition, appellant's arguments have emphasized that the statements conveyed to the jury by the gang expert constituted testimonial hearsay. (HCPA pp. 22-27; AOB pp. 52-53, 57.) Appellant's arguments also emphasize that the denial of his informant disclosure motion illegitimately prevented him from cross-examining the gang expert about the

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2 "HCPA" refers to the Memorandum of Points and Authorities in Support of the Petition for Writ of Habeas Corpus, filed by appellant in the Federal District Court.

"AHCPA" refers to the Memorandum of Points and Authorities in Support of the Answer to the Petition for Writ of Habeas Corpus, filed by appellee in the Federal District Court.

informants as the source for much of the information he utilized to form his opinions. (HCPA p. 21.)

Appellant has made these same arguments in this Court. (AOB pp. 51-59; ARB pp. 39-42.)

The Court's decision additionally rejects appellant's contention that a Confrontation Clause violation occurred when the prosecution gang expert conveyed hearsay statements from confidential informants to the jury. According to the Court's decision, the informants' statements were offered as a "basis" for the expert's opinion rather than the truth. (Dec. p. 3.)

This "basis evidence" concerning the confidential informants is no different in kind than the expert's other testimony, which the state Court of Appeal and this Court rely upon to find the evidence sufficient to establish proof of collaborative activities or collective organizational structure. Virtually all of the gang expert's testimony was conclusory, basis evidence of the kind represented by the testimony concerning the informants. Thus, if the expert's testimony concerning the informants was mere "basis evidence," not offered for its truth, then the evidence in this case overall was clearly insufficient to establish proof of collaborative activities or collective organizational structure. (*McDonald v. Hedgpeth*, at 1222, citing *Johnson v.*

Montgomery, at 1058 [conclusory expert testimony alone is insufficient to find an offense gang related].)

In addition to the Court's holding that there was no confrontation violation in this case because Detective Tribble only conveyed "basis" and "background" information, not offered for its truth, the Court also holds that *Williams v. Illinois*, 567 U.S. 50 is a fractured decision which does not constitute clearly established federal law in this habeas proceeding as to any relevant Confrontation Clause claim. (Dec. 4.)

The decision of the California Supreme Court in *People v. Sanchez*, 63 Cal.4th 665, 697 (2016) was issued to curtail the jury's utilization of testimonial hearsay from a gang expert for the truth of the matter asserted, which has been the tendency in California gang prosecutions for many years. (*People v. Sanchez*, at 686 & fn. 13.) *Sanchez* relies on *Williams v. Illinois* in support of its holdings. Whether or not *Sanchez* can be retroactively applied to appellant's case, the opinion is instructive on the suitability of *Williams v. Illinois* as existing U.S. Supreme Court authority in the context of proceedings under the AEDPA.

This Court does not cite any authority for the proposition that *Williams v. Illinois* does not constitute clearly established federal law in a 28 U.S.C. section 2254(d) habeas proceeding. Appellant is unaware of any

such authority. And for the same reasons that the California Supreme Court found *Williams v. Illinois* to be relevant in nearly identical circumstances, appellant submits that *Williams v. Illinois* constitutes clearly established federal law under the AEDPA for purposes of this federal habeas proceeding.

Appellant additionally asserts, as he has averred throughout these proceedings, that *Roviaro v. United States*, 353 U.S. 53 and *Banks v. Dretke*, at 697-698 constitute clearly established case law issued from the U.S. Supreme Court in these federal habeas proceedings, which support's his claim that the denial of his informant disclosure motion violated his rights to confrontation, cross-examination, due process, and fair trial under the Sixth and Fourteenth Amendments. Although *Roviaro* was not decided "on the basis of constitutional claims," subsequent Supreme Court and Ninth Circuit case law makes clear that due process concerns undergrid the *Roviaro* requirement. (*United States v. Struckman*, 611 F.3d 560, 580 (9th Cir. 2010), Berzon J. concurring; see also, *Gupta v. Runnels*, 116 Fed. Approx. 816, 817 (9th Cir. 2004).)

Therefore, appellant respectfully submits that his Confrontation Clause and informant disclosure claims in this matter are supported by clearly established case law issued from the U.S. Supreme Court.

Ultimately, this Court's opinion conflicts with the holdings of the U.S. Supreme Court in *Williams v. Illinois*, 567 U.S. 50, *Roviaro v. United States*, 353 U.S. 53 and *Banks v. Dretke*, 540 U.S. 668. Therefore, the grant of a petition for writ of certiorari is necessary to resolve the conflict presented by this case under these cases.

For these reasons, appellant submits that a petition for writ of certiorari in this matter will present a substantial question and there is good cause to stay the Mandate.

Respectfully submitted,

Dated: August 21, 2019.

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Tab 3

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHANE AUSTIN PETERS, Petitioner-Appellant, v. ERIC ARNOLD, Warden, Respondent-Appellee.	No. 17-17485 D.C. No. 2:15-cv-00586-JKS Eastern District of California, Sacramento ORDER

Before: THOMAS, Chief Judge, PAEZ, Circuit Judge, and FEINERMAN,* District Judge.

The panel has voted to deny the petition for rehearing. Chief Judge Thomas and Judge Paez have voted to deny the petition for rehearing en banc, and Judge Feinerman so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are denied.

* The Honorable Gary Feinerman, United States District Judge for the Northern District of Illinois, sitting by designation.

Tab 4

17-17485

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SHANE AUSTIN PETERS

Petitioner-Appellant,

v.

ERIC ARNOLD, Warden, California State Prison, Solano

Respondents-Appellees.

On Appeal from an Order Denying a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of California
(District Court Case No. 2:15-cv-00586-JKS)

APPELLANT'S PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC

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INTRODUCTION

Appellant, Shane Austin Peters, through counsel, petitions for rehearing and rehearing en banc of the decision of this Court (DktEntry 43-1 [hereafter "Dec."]) of April 23, 2019, entering judgment in favor of Appellee and affirming the decision of the Federal District Court for the Eastern District of California.

A panel rehearing is appropriate when a material point of law was overlooked in the decision. (FRAP Rule 40(a)(2); 9th Cir. Rule 40-1.) An en banc rehearing by this Circuit is proper when (1) the panel decision conflicts with a decision of the Supreme Court or a decision of this Circuit so that consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions or (2) the proceeding involves a question of exceptional importance. (FRAP Rule 35(b); 9th Cir. Rule 35-1.)

In the judgment of appellant's counsel, the panel's decision in this matter overlooks material points of law; presents a resulting conflict with *McDonald v. Hedgpeth*, 907 F.3d 1212 (9th Cir. 2018), *Johnson v. Montgomery*, 899 F.3d 1052 (9th Cir. 2018), and *McDaniel v. Brown*, 558 U.S. 120 (2010) regarding his sufficiency of the evidence claims; and presents a conflict with *Williams v. Illinois*, 567 U.S. 50 (2012), *Roviaro v. United States*, 353 U.S. 53 (1957) and *Banks v. Dretke*, 540 U.S. 668 (2004) regarding his confrontation and informant disclosure claims.

The following arguments are applicable to a Combination Petition for Panel Rehearing and Petition for Rehearing En Banc (FRAP Rule 35; Rule 40)

ARGUMENT

I

THE OPINION OVERLOOKS MATERIAL POINTS OF LAW, RESULTING IN A CONFLICT WITH DECISIONS FROM THE NINTH CIRCUIT AND THE U.S. SUPREME COURT, SO THAT REHEARING IS NECESSARY TO SECURE UNIFORMITY OF DECISION

A

SUFFICIENCY OF THE EVIDENCE CLAIMS

Under the California STEP Act, in order to qualify as a subset gang under the provisions of Penal Code section 186.22(b)(1), there has to be proof of collaborative activities or collective organizational structure between the subset gang and the larger Norteno group. (*People v. Williams*, 167 Cal.App.4th 983, 987 (2008); *People v. Prunty*, 6 Cal.4th 59 (2015).)

Appellant has argued in his briefing in this case that the appellate record discloses a complete lack of evidence of collaborative activities or collective organizational structure between the alleged NVS subset gang and the larger Norteno group. (AOB pp. 28-37; ARB pp. 13, 21-32.)1/

But, this Court's decision holds that the testimony of the prosecution's gang expert and lay witnesses raised a reasonable inference that the NVS subset and

the Norteno group shared some sort of collaborative activities or collective organizational structure, such that they could be considered together for purposes of section 186.22(f). (Dec. p. 2; see, RB pp. 18-20, 22-23, 25-26.)

Appellant respectfully submits that this portion of the Court's decision overlooks his arguments that expert testimony in the form of "basis evidence" or "background evidence" presented by Detective Tribble, along with lay testimony by Richard Eads, does not amount to sufficient evidence of collaborative activities or collective organizational structure. (ARB pp. 16-17.)

As appellant has argued in the Opening Brief under the holding of *In re Alexander L*. 149 Cal.App.4th 605 (2007), "conclusory" "basis" or "background" evidence of the type presented by Detective Tribble is insufficient to establish the elements of a Penal Code section 186.22(b)(1) charge. (AOB pp. 42-46.) Appellant has also argued in the Opening Brief that the lay testimony of Richard Eads simply does not provide proof of collaborative activities or collective organizational structure. (AOB pp. 32-33.) To the contrary, under cross-

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1 "AOB" refers to Appellant's Opening Brief filed in this case.

"RB" refers to Respondent's Brief filed in this case.

"ARB" refers to Appellant's Reply Brief filed in this case.

"Opn." refers to the Opinion of the state Court of Appeal.

examination Richard Eads revealed that he did not even know that such things as "the 14 bonds" and "paying up the chain" could be indicative of collaborative activities or collective organizational structure. His testimony simply failed completely to provide any facts from which an inference of collaborative activities or collective organizational structure could be made. (ARB pp. 16-17 & fn. 6.)

This Court is required to follow the holding of *Alexander L.* on this point of law in the instant case, because it constitutes state law pertaining to "the substantive elements" of a criminal street gang charge (*Coleman v. Johnson*, 566 U.S. 650, 655 (2012) [federal courts must look to state law for "the substantive elements of the criminal offense"]) and because federal habeas review of a sufficiency of the evidence claim is performed "with explicit reference to the substantive elements of the criminal offense as defined by state law" (*Jackson v. Virginia*, 443 U.S. 307, 324, fn. 16 (1979). (See also, *Bradshaw v. Richey*, 546 U.S. 74 (2005) [federal courts must follow state court's interpretation of state law]; and see, *McDonald v. Hedgpeth*, at 1222, citing *Johnson v. Montgomery*, at 1058 [conclusory expert testimony alone is insufficient to find an offense gang related].)

This Court's decision additionally casts the foregoing arguments as to conclusory, basis, testimony of the gang expert as an argument by appellant that

the California Court of Appeal erred in interpreting state law. The Court cites to *McDaniel v. Brown*, 558 U.S. 120 and *Johnson v. Montgomery*, 899 F.3d at page 1058, essentially for the proposition that the collective evidence in this case tending to prove other elements of a 186.22(b)(1) charge culminates in an inference of collaborative activities or collective organizational structure-- an argument which directly contradicts the holding of both *Williams* and *Prunty*.

Consistent with *McDonald v. Hedgpeth*, 907 F.3d at page 1222, footnote 4, appellant's reliance on *Alexander L.* here is "solely to define the elements of the gang enhancement, as *Jackson* requires," thereby demonstrating agreement with federal sufficiency of the evidence analysis. Appellant's arguments as to conclusory expert gang testimony under *Alexander L.* simply underscore the rule that federal habeas review of a sufficiency of the evidence claim is performed "with explicit reference to the substantive elements of the criminal offense as defined by state law." (See, *Jackson v. Virginia*, at 324, fn. 16; and see, *Bradshaw v. Richey*, 546 U.S. 74 [federal courts must follow state court's interpretation of state law].)

Moreover, *Alexander L.*, *Williams*, and *Prunty* are "sufficiency of the evidence" cases pertaining to gang prosecutions and not "admissibility of evidence" cases. These cases do not concern themselves with the question of whether or not a gang expert's testimony was properly admitted at trial.

McDaniel v. Brown, 558 U.S. 120 has currency only in the confines of "erroneous admission of evidence" cases under the AEDPA and is irrelevant to "sufficiency of the evidence" cases falling outside of the erroneous evidence admission arena. Appellant has not challenged the testimony of Detective Tribble on grounds it was admitted erroneously. Appellant's argument is that "basis" or "background" evidence is not admitted as independent proof of facts necessary to satisfy elements of a criminal gang charge. (*People v. Gardeley*, 14 Cal.4th 605, 619 (1996) [testimony relating basis evidence does not "transform inadmissible matter into independent proof of any fact"].) Appellant's argument is a "sufficiency of the evidence" argument not an "erroneous admission of evidence argument." This Court is required to follow the holding of *Gardeley* on this point because it constitutes state law pertaining to "the substantive elements" of a criminal street gang charge. (*Coleman v. Johnson*, at 655 [federal courts must look to state law for "the substantive elements of the criminal offense"]; accord, *Bradshaw v. Richey*, 546 U.S. 74.) Furthermore, basis and background evidence have no evidentiary value other than to provide a foundation for the expert's testimony. This evidence simply does not count as case specific evidentiary facts in the manner that appellee would have it count under the holding of *McDaniel v. Brown*, 558 U.S. 120. *McDaniel v. Brown* has never

been expanded in any opinion to the point that it contradicts the controlling effect of substantial elements case law.

Ultimately, it is not enough in a subset gang prosecution to show that the umbrella group and subset group are united by things like a shared common name, common identifying symbols, or a common enemy. (*Prunty*, at 72.) Thus, the prosecution's reliance on such things as gang colors, graffiti, and a common enemy in this case (RB pp. 25-27) does not constitute proof from which an inference of collaborative activities or collective organizational structure can be drawn. In short, the things that prove other elements of a 186.22(b)(1) charge-- such as predicate offenses and engaging in primary criminal activities, for example-- cannot be utilized to prove collaborative activities or collective organizational structure.

There are examples of actual proof of collaborative activities or collective organizational structure. They are: (1) shared bylaws or organizational structure, (2) independent activities that benefit the higher ranking individual or group, by for example, sharing a cut of drug sale proceeds, (3) strategizing or working in concert to commit a crime, (4) hanging out together or backing each other up, and (5) mutual acknowledgement of one another as part of that same organization. (*Prunty*, at 77-80.) Ultimately, "[T]he evidence must show that an organizational or associational connection exists in fact, not merely that a local subset has

represented itself as an affiliate of what the prosecution asserts is a larger organization." (*Prunty*, at 79.)

The evidence in this case constitutes none of these things. Collaborative activities or collective organizational structure cannot just be inferred from proof tending to establish other required elements of a Penal Code section 186.22(b)(1) charge. Both *Williams* and *Prunty* require independent proof of facts from which collaborative activities or collective organizational structure can be inferred, and this Court is required to perform its sufficiency of the evidence analysis "with explicit reference to the substantive elements of the criminal offense as defined by state law." (See, *Jackson v. Virginia*, at 324, fn. 16; and see, *Bradshaw v. Richey*, 546 U.S. 74 [federal courts must follow state court's interpretation of state law]; see also, *McDonald v. Hedgpeth*, at 1222, citing *Johnson v. Montgomery*, at 1058 [conclusory expert testimony alone is insufficient to find an offense gang related].)

This Court's opinion additionally holds that the state Court of Appeal did not shift the burden of proof, when it laid out the evidence of a connection between NVS and the Nortenos, and "merely observed that no evidence cut the other way." (Dec. p. 3.)

But the State Court of Appeal's holding was that "[no] evidence indicated the goals and activities of a particular subset were not shared by others." (Opn. p.

10.) This holding mimics a passage from the opinion in *Williams*, at page 987 (and from the opinion in *People v. Ortega*, 145 Cal.App.4th 1344, 1356-1357 (2006)) in a way that is ultimately contrary to the actual holding of *Williams*. This was a calculated attempt to distort the holdings in *Williams* and *Ortega*, and not a mere observance that no evidence cut the other way. Thus, under this distorted holding, collaborative activities or collective organizational structure can simply be inferred, in the absence of proof provided by the defendant that the goals of the subset are *not* shared with the larger group. In other words, the prosecution is not required to prove collaborative activities or collective organizational structure. (AOB p. 30.)

The state Court of Appeal's finding that appellant failed to prove the absence of collaborative activities or collective organizational structure under *Williams* does, in fact, shift the burden of proof in contravention of *In re Winship*, 397 U.S. 364, 358, (1970). (AOB pp. 29-33.)

The prosecution's burden to prove every fact necessary to establish the charge beyond a reasonable doubt under *Winship* is constitutional bedrock. The notion that it was appellant's obligation to prove the absence of collaborative activities or collective organizational structure under *Williams* and *Ortega* is objectively unreasonable. (*Coleman v. Johnson*, 566 U.S. 650 [federal court may overturn state court conviction only if state court decision was "objectively

unreasonable"]; accord, *Juan H. v. Allen*, 408 F.3d 1262, 1274-1275 (9th Cir. 2005).)

In the final analysis, appellant's insufficiency of the evidence claim as to proof of collaborative activities or collective organizational structure clearly meets the test of *Jackson v. Virginia*, 443 U.S. 307 with an additional layer of deference. (See, *Juan H.*, at 1274.) There simply is no evidence NVS and the Nortenos committed crimes together, no evidence the Nortenos directed any of the activities of NVS, and no evidence NVS owed fealty to the Nortenos or paid tribute to the Nortenos. There is no evidence the Nortenos even knew NVS existed.2/ The decision of the State Court of Appeal, therefore, reflects an "unreasonable application of *Jackson* and *Winship* to the facts of this case." (*Juan H.*, at 1275.)

Appellant lastly notes in advance this Court's holding that there was no Confrontation Clause violation in the gang expert's testimony based on

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2 The prosecution proceeded on a "subset gang" theory in this case because it could not prove the required elements to establish NVS as a criminal street gang in its own right. For example, the prosecution sought to satisfy the primary activities element of a 186.22(b) charge with crimes committed by Norteno gang members, not NVS gang members. (ARB p. 27) But, under *Williams* and *Prunty*, these crimes by Norteno gang members do not apply to meet the primary activities element as to NVS, because no proof of collaborative activities or collective organizational structure between the alleged NVS subset and the larger Norteno group was provided at trial.

information from confidential informants, because the informants' statements "were offered as a basis for the expert's opinion rather than for their truth." (Dec. p. 3.) Appellant respectfully submits that this holding significantly undercuts the Court's other holding that the evidence supplied by the gang expert was sufficient to establish collaborative activities or collective organizational structure. This is so because "basis" or "background" evidence is not admitted as independent proof of facts necessary to satisfy elements of a criminal gang charge. (*Gardeley*, at 619.) Basis and background evidence of the kind submitted by the prosecution gang expert in this case simply have no evidentiary value other than to provide a foundation for the expert's testimony. (*Ibid*.; see also, *In re Alexander L*. 149 Cal.App.4th 605 ["conclusory" "basis" or "background" evidence is insufficient to establish the elements of a Penal Code section 186.22(b)(1) charge]; and see, *McDonald v. Hedgpeth*, at 1222, citing *Johnson v. Montgomery*, at 1058 [conclusory expert testimony alone is insufficient to find an offense gang related].)

The Court's opinion cites to *Johnson v. Montgomery*, 899 F.3d 1052 and *McDaniel v. Brown*, 558 U.S. 120 in support of the proposition that appellant has argued that "the California Court of Appeal erred in interpreting state law." As has been previously explained in this Petition for Rehearing and in Appellant's Reply Brief, appellant has not argued that the state Court of Appeal erred in

interpreting state law. What appellant has argued is that the evidence of collaborative activities or collective organizational structure was insufficient under the holdings of *Williams*, *Prunty*, and *Alexander L.*, because the prosecution must prove collaborative activities or collective organizational structure by means other than conclusory, basis, testimony elicited from a gang expert. (See, ARB pp. 14-17 [appellee's assertion that appellant has argued "misapplication of state law" is a *Straw man* supported by a *red hearing*].)

Furthermore, this Court's opinion contains no mention of the holding of *McDonald v. Hedgpeth*, at page 1222, which cites to *Johnson v. Montgomery*, at page 1058 for the proposition that conclusory expert testimony alone is insufficient to find an offense gang related.

In essence, this Court's decision conflates appellant's actual arguments that the evidence was insufficient to establish collaborative activities or collective organizational structure under California decisional law with the proposition that appellant has argued that the state Court of Appeal erred in interpreting state law. In the process, the Court's opinion is directly contrary to the holdings from *McDonald v. Hedgpeth*, at page 1221, footnote 3 and *Johnson v. Montgomery*, at page 1059, footnote 1 to the effect that a federal habeas court must rely on California decisional law pertaining to the elements of the offense when evaluating sufficiency of the evidence. Ultimately, the state Court of Appeal's

decision in this matter is unreasonable because it is not in "harmony with," and is "discordant" with, the decisions in *Alexander L.*, *Williams*, and *Prunty*. (See, i.e., *Johnson v. Montgomery*, at p. 1059, fn. 1.)

It is respectfully submitted that this Court's reliance on *McDaniel v. Brown*, 558 U.S. 120 incongruously interjects an evidence admissibility construct into circumstances where this Court is required to perform its sufficiency of the evidence analysis "with explicit reference to the substantive elements of the criminal offense as defined by state law" under the holdings of *Jackson v. Virginia*, at page 324, footnote 16 and *Bradshaw v. Richey*, 546 U.S. 74.

II

THE OPINION OVERLOOKS MATERIAL POINTS OF LAW, RESULTING IN A CONFLICT WITH DECISIONS FROM THE NINTH CIRCUIT AND THE U.S. SUPREME COURT, SO THAT REHEARING IS NECESSARY TO SECURE UNIFORMITY OF DECISION

A

CONFRONTATION AND INFORMANT DISCLOSURE MOTION CLAIMS

The Court's decision holds that the state Court of Appeal did not unreasonably apply established federal law in concluding that the trial court did not violate the Confrontation Clause by admitting expert testimony that was based in part on information from confidential informants. (Dec. p. 3.) The Court's decision additionally holds that appellant's claim regarding the trial

court's preventing him from eliciting information identifying the confidential informants on cross-examination of the prosecution's expert is forfeited because he has failed to develop his argument or cite any authority for the proposition that the restriction was improper. (Dec. p. 4.) The Court holds further that the California Court of Appeal's decision is not an unreasonable application of *Roviaro v. United States*, 353 U.S. 53. (Dec. 4.)

Appellant respectfully submits that the Court's decision overlooks much of what appellant has argued on his appeal in regards to the constitutional violations concerning the informants.

Appellant has argued in the state trial court, the state Court of Appeal, and the Federal District Court that the prosecution gang expert relied on information provided by five confidential informants to form his expert opinions, and the trial court's failure to require disclosure of the identities of the informants violated his Sixth and Fourteenth Amendment rights to confrontation, cross-examination, a fair trial, and due process of law. (HCPA pp. 20-28.)3/

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3 "HCPA" refers to the Memorandum of Points and Authorities in Support of the Petition for Writ of Habeas Corpus, filed by appellant in the Federal District Court.

"AHCPA" refers to the Memorandum of Points and Authorities in Support of the Answer to the Petition for Writ of Habeas Corpus, filed by appellee in the Federal District Court.

Appellant's arguments also emphasize that the gang expert offered information obtained from the informants for the truth of the matter asserted, and the gang expert admitted that he had no personal knowledge of the information furnished by the informants, that he had not verified the information in any way, and did not know if it was accurate. (HCPA p. 20.) In addition, appellant's arguments have emphasized that the statements conveyed to the jury by the gang expert constituted testimonial hearsay. (HCPA pp. 22-27; AOB pp. 52-53, 57.) Appellant's arguments also emphasize that the denial of his informant disclosure motion illegitimately prevented him from cross-examining the gang expert about the informants as the source for much of the information he utilized to form his opinions. (HCPA p. 21.)

Appellant has made these same arguments in this Court. (AOB pp. 51-59; ARB pp. 39-42.)

The Court's decision additionally rejects appellant's contention that a Confrontation Clause violation occurred when the prosecution gang expert conveyed hearsay statements from confidential informants to the jury. According to the Court's decision, the informants' statements were offered as a basis for the expert's opinion rather than the truth. (Dec. p. 3.)

As to this holding, appellant reiterates his earlier arguments from this Petition for Rehearing at pages 12 and 17, *post*, that "basis" or "background"

evidence from a gang expert is not admitted as independent proof of facts necessary to satisfy elements of a criminal gang charge. (*Gardeley*, at 619.) Basis and background evidence have no evidentiary value other than to provide a foundation for the expert's testimony. (*Ibid*.) In the final analysis, this "basis evidence" concerning the confidential informants is no different in kind than the expert's other testimony which the state Court of Appeal and this Court rely upon to find the evidence sufficient to establish proof of collaborative activities or collective organizational structure. Virtually all of the gang expert's testimony was conclusory, basis evidence, of the kind represented by the testimony concerning the informants. Thus, if the expert's testimony concerning the informants was mere "basis evidence," not offered for its truth, then the evidence in this case overall was clearly insufficient to establish proof of collaborative activities or collective organizational structure. (*McDonald v. Hedgpeth*, at 1222, citing *Johnson v. Montgomery*, at 1058 [conclusory expert testimony alone is insufficient to find an offense gang related].)

In addition to the Court's holding that there was no confrontation violation in this case because Detective Tribble only conveyed "basis" and "background" information, not offered for its truth, the Court also holds that *Williams v. Illinois*, 567 U.S. 50 is a fractured decision which does not constitute clearly established

federal law in this habeas proceeding as to any relevant Confrontation Clause claim. (Dec. 4.)

The decision of the California Supreme Court in *People v. Sanchez*, 63 Cal.4th 665, 697 (2016) was issued to curtail the jury's utilization of testimonial hearsay from a gang expert for the truth of the matter asserted, which has been the tendency in California gang prosecutions for many years. (*People v. Sanchez*, at 686 & fn. 13.) *Sanchez* relies on *Williams v. Illinois* in support of its holdings. Whether or not *Sanchez* can be retroactively applied to appellant's case, the opinion is instructive on the suitability of *Williams v. Illinois* as existing U.S. Supreme Court authority in the context of proceedings under the AEDPA.

Appellant notes here that the Court does not cite any authority for the proposition that *Williams v. Illinois* does not constitute clearly established federal law in a 28 U.S.C. section 2254(d) habeas proceeding. Appellant is unaware of any such authority. And for the same reasons that the California Supreme Court found *Williams v. Illinois* to be relevant in nearly identical circumstances, appellant submits that *Williams v. Illinois* constitutes clearly established federal law under the AEDPA for purposes of this federal habeas proceeding.

Appellant additionally asserts, as he has averred throughout these proceedings, that *Roviaro v. United States*, 353 U.S. 53 and *Banks v. Dretke*, at pages 697-698 constitute clearly established case law issued from the U.S.

Supreme Court in these federal habeas proceedings, which support's his claim that the denial of his informant disclosure motion violated his rights to confrontation, cross-examination, due process, and fair trial under the Sixth and Fourteenth Amendments. Although *Roviaro* was not decided "on the basis of constitutional claims," subsequent Supreme Court and Ninth Circuit case law makes clear that due process concerns undergrid the *Roviaro* requirement. (*United States v. Struckman*, 611 F.3d 560, 580 (9th Cir. 2010), Berzon J. concurring; see also, *Gupta v. Runnels*, 116 Fed. Approx. 816, 817 (9th Cir. 2004) [state court's decision withholding identity of informant was contrary to clearly established U.S. Supreme Court authority in *Roviaro v. United States*].)

Therefore, appellant respectfully submits that his Confrontation Clause and informant disclosure claims in this matter are supported by clearly established case law issued from the U.S. Supreme Court.

CONCLUSION

For all the reasons expressed herein, this Court should grant the Petition for Rehearing and Rehearing En Banc.

Dated: April 2, 2019.

/s/ Richard V. Myers
Richard V. Myers (133027)
Attorney at Law
1908 Marcus Abrams Blvd.
Yucca Valley, CA 92284

Telephone: 909-522-6388
FAX: 760-418-5521

Counsel for Petitioner- Appellant

Tab 5

NOT FOR PUBLICATION

FILED

APR 23 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHANE AUSTIN PETERS, Petitioner-Appellant, v. ERIC ARNOLD, Warden, Respondent-Appellee.	No. 17-17485 D.C. No. 2:15-cv-00586-JKS MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
James K. Singleton, Jr., Senior District Judge, Presiding

Submitted February 6, 2019**
San Francisco, California

Before: THOMAS, Chief Judge, PAEZ, Circuit Judge, and FEINERMAN,*** District Judge.

Shane Austin Peters appeals the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. We have jurisdiction under 28 U.S.C. §§ 1291

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Gary Feinerman, United States District Judge for the Northern District of Illinois, sitting by designation.

and 2253, and we affirm.

The district court correctly held that the California Court of Appeal did not unreasonably apply *Jackson v. Virginia*, 443 U.S. 307 (1979), in holding that the evidence was sufficient to support the jury's true finding on the gang enhancement under section 186.22(b)(1) of the California Penal Code. *See* 28 U.S.C. § 2254(d)(1). The state court reasonably held that the evidence was sufficient to support a finding that the North Vallejo Savages ("NVS") were a "criminal street gang." Cal. Penal Code § 186.22(f). The jury was entitled to believe expert and lay witness testimony that NVS was a subgroup of the Norteños. *See Long v. Johnson*, 736 F.3d 891, 896 (9th Cir. 2013). That testimony raised a reasonable inference that the groups shared "some sort of collaborative activities or collective organizational structure" such that they could be considered together for purposes of section 186.22(f). *People v. Williams*, 86 Cal. Rptr. 3d 130, 135 (Ct. App. 2008).

Expert testimony that NVS had seven to ten members was sufficient to support the jury's finding that it had at least three members. And given the link between NVS and the Norteños, the expert's testimony about the Norteños' primary activities, his testimony that he personally knew of two convictions for predicate offenses, and exhibits documenting the convictions, a reasonable jury could conclude that the "primary activities" and "pattern of criminal gang activity"

elements of section 186.22(f) were satisfied—or so the state court could hold without applying *Jackson* in an objectively unreasonable manner. *See Johnson v. Montgomery*, 899 F.3d 1052, 1058-59 (9th Cir. 2018); *Long*, 736 F.3d at 896.

Peters's submission that the California Court of Appeal erred in interpreting state law and in holding that the expert testimony rested on an adequate foundation is irrelevant to this court's evaluation on federal habeas review of whether the state court reasonably applied *Jackson*. *See McDaniel v. Brown*, 558 U.S. 120, 131 (2010); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Johnson*, 899 F.3d at 1059 & n.1. And contrary to Peters's argument, the state court did not shift the burden of proof when, after laying out the evidence of a connection between NVS and the Norteños, it merely observed that no evidence cut the other way.

Nor did the California Court of Appeal unreasonably apply clearly established federal law in concluding that the trial court did not violate the Confrontation Clause by admitting expert testimony that was based in part on information from confidential informants. The state court's conclusion that the confidential informants' statements were offered as a basis for the expert's opinion rather than for their truth—and that the Confrontation Clause therefore did not apply, *see United States v. Johnson*, 875 F.3d 1265, 1278 (9th Cir. 2017)—was not foreclosed by clearly established federal law. The California Supreme Court's opinion in *People v. Sanchez*, 374 P.3d 320 (Cal. 2016), does not count as clearly

established federal law for purposes of federal habeas review because it post-dates the state court's adjudication and is not a United States Supreme Court decision. *See Shoop v. Hill*, 139 S. Ct. 504, 506 (2019). And the fractured decision in *Williams v. Illinois*, 567 U.S. 50 (2012), did not clearly establish any Confrontation Clause principle relevant here. *See Williams*, 567 U.S. at 141 (Kagan, J., dissenting) (maintaining that "[w]hat comes out of" the Court's fractured decision "is—to be frank—who knows what"); *United States v. James*, 712 F.3d 79, 95 (2d Cir. 2013).

Finally, Peters's habeas claim regarding the trial court's preventing him from eliciting information identifying the confidential informants on cross-examination of the prosecution's expert is forfeited because he has failed to develop his argument or cite any authority for the proposition that the restriction was improper. *See United States v. Cazares*, 788 F.3d 956, 983 (9th Cir. 2015) ("The failure to cite to valid legal authority waives a claim for appellate review."). In any event, the California Court of Appeal's decision rejecting Peters's challenge to the trial court's ruling is not an unreasonable application of *Roviaro v. United States*, 353 U.S. 53 (1957).

AFFIRMED.

Tab 6

UNITED STATES COURT OF APPEALS for the NINTH CIRCUIT

Office of the Clerk

After Opening a Case – Counseled Cases

(revised April 2016)

Court Address – San Francisco Headquarters

Mailing Address for U.S. Postal Service	*Mailing Address for Overnight Delivery (FedEx, UPS, etc.)*	*Street Address*
Office of the Clerk James R. Browning Courthouse U.S. Court of Appeals P.O. Box 193939 San Francisco, CA 94119-3939	Office of the Clerk James R. Browning Courthouse U.S. Court of Appeals 95 Seventh Street San Francisco, CA 94103-1526	95 Seventh Street San Francisco, CA 94103

Court Addresses – Divisional Courthouses

Pasadena	*Portland*	*Seattle*
Richard H. Chambers Courthouse 125 South Grand Avenue Pasadena, CA 91105	The Pioneer Courthouse 700 SW 6th Ave, Ste 110 Portland, OR 97204	William K. Nakamura Courthouse 1010 Fifth Avenue Seattle, WA 98104

Court Website – www.ca9.uscourts.gov

The Court's website contains the Court's Rules and General Orders, information about electronic filing of documents, answers to frequently asked questions, directions to the courthouses, forms necessary to gain admission to the bar of the Court, opinions and memoranda, live streaming of oral arguments, links to practice manuals, and an invitation to join our Pro Bono Program.

Court Phone List

Main Phone Number	**(415) 355-8000**
Attorney Admissions	(415) 355-7800
Calendar Unit	(415) 355-8190
CJA Matters (Operations Unit)	(415) 355-7920
Docketing	(415) 355-7840
Death Penalty	(415) 355-8197
Electronic Filing – CM/ECF	Submit form at http://www.ca9.uscourts.gov/cmecf/feedback
Library	(415) 355-8650
Mediation Unit	(415) 355-7900
Motions Attorney Unit	(415) 355-8020
Procedural Motions Unit	(415) 355-7860
Records Unit	(415) 355-7820
Divisional Court Offices:	
Pasadena	(626) 229-7250
Portland	(503) 833-5300
Seattle	(206) 224-2200

Electronic Filing - CM/ECF

The Ninth Circuit's CM/ECF (Case Management/Electronic Case Files) system is mandatory for all attorneys filing in the Court, unless they are granted an exemption. All non-exempted attorneys who appear in an ongoing case are required to register for and to use CM/ECF. Registration and information about CM/ECF is available on the Court's website at www.ca9.uscourts.gov under *Electronic Filing–CM/ECF*. Read the Circuit Rules, especially Ninth Circuit Rule 25-5, for guidance on filing documents electronically via CM/ECF, and see the CM/ECF User Guide for a complete list of the available types of filing events.

Rules of Practice

The Federal Rules of Appellate Procedure (Fed. R. App. P.), the Ninth Circuit Rules (9th Cir. R.) and the General Orders govern practice before this Court. The rules are available on the Court's website at www.ca9.uscourts.gov under *Rules*.

Practice Resources

The Appellate Lawyer Representatives' Guide to Practice in the United States Court of Appeals for the Ninth Circuit is available on the Court's website www.ca9.uscourts.gov at *Guides and Legal Outlines* > *Appellate Practice Guide*. The Court provides other resources in *Guides and Legal Outlines*.

Admission to the Bar of the Ninth Circuit

All attorneys practicing before the Court must be admitted to the Bar of the Ninth Circuit. Fed. R. App. P. 46(a); 9th Cir. R. 46-1.1 & 46-1.2.

For instructions on how to apply for bar admission, go to www.ca9.uscourts.gov and click on the *Attorneys* tab > *Attorney Admissions* > *Instructions*.

Notice of Change of Address

Counsel who are registered for CM/ECF must update their personal information, including street addresses and email addresses, online at: https://pacer.psc.uscourts.gov/pscof/login.jsf 9th Cir. R. 46-3.

Counsel who have been granted an exemption from using CM/ECF must file a written change of address with the Court. 9th Cir. R. 46-3.

Motions Practice

Following are some of the basic points of motion practice, governed by Fed. R. App. P. 27 and 9th Cir. R. 27-1 through 27-14.

- Neither a notice of motion nor a proposed order is required. Fed. R. App. P. 27(a)(2)(C)(ii), (iii).
- Motions may be supported by an affidavit or declaration. 28 U.S.C. § 1746.

- Each motion should provide the position of the opposing party. Circuit Advisory Committee Note to Rule 27-1(5); 9th Cir. R. 31-2.2(b)(6).
- A response to a motion is due 10 days from the service of the motion. Fed. R. App. P. 27(a)(3)(A); Fed. R. App. P. 26(c). The reply is due 7 days from service of the response. Fed. R. App. P. 27(a)(4); Fed. R. App. P. 26(c).
- A response requesting affirmative relief must include that request in the caption. Fed. R. App. P. 27(a)(3)(B).
- A motion filed in a criminal appeal must include the defendant's bail status. 9th Cir. R. 27-2.8.1.
- A motion filed after a case has been scheduled for oral argument, has been argued, is under submission or has been decided by a panel, must include on the initial page and/or cover the date of argument, submission or decision and, if known, the names of the judges on the panel. 9th Cir. R. 25-4.

Emergency or Urgent Motions

All emergency and urgent motions must conform with the provisions of 9th Cir. R. 27-3. Note that a motion requesting procedural relief (e.g., an extension of time to file a brief) is *not* the type of matter contemplated by 9th Cir. R. 27-3. Circuit Advisory Committee Note to 27-3(3).

Prior to filing an emergency motion, the moving party *must* contact an attorney in the Motions Unit in San Francisco at (415) 355-8020.

When it is absolutely necessary to notify the Court of an emergency outside of standard office hours, the moving party shall call (415) 355-8000. Keep in mind that this line is for true emergencies that cannot wait until the next business day (e.g., an imminent execution or removal from the United States).

Briefing Schedule

The Court generally issues the briefing schedule at the time the appeal is docketed.

Certain motions (e.g., a motion for dismissal) automatically stay the briefing schedule. 9th Cir. R. 27-11.

The opening and answering brief due dates are not subject to the additional time described in Fed. R. App. P. 26(c). 9th Cir. R. 31-2.1. The early filing of

appellant's opening brief does not advance the due date for appellee's answering brief. *Id.*

Extensions of Time to File a Brief

Streamlined Request
Subject to the conditions described at 9th Cir. R. 31-2.2(a), you may request one streamlined extension of up to 30 days from the brief's existing due date. Submit your request via CM/ECF using the "File Streamlined Request to Extend Time to File Brief" event on or before your brief's existing due date. No form or written motion is required.

Written Extension
Requests for subsequent extensions or extensions of more than 30 days will be granted only upon a written motion supported by a showing of diligence and substantial need. This motion shall be filed at least 7 days before the due date for the brief. The motion shall be accompanied by an affidavit or declaration that includes all of the information listed at 9th Cir. R. 31-2.2(b).

The Court will ordinarily adjust the schedule in response to an initial motion. Circuit Advisory Committee Note to Rule 31-2.2. The Court expects that the brief will be filed within the requested period of time. *Id.*

Contents of Briefs

The required components of a brief are set out at Fed. R. App. P. 28 and 32, and 9th Cir. R. 28-2, 32-1 and 32-2. After the electronically submitted brief has been reviewed, the Clerk will request 7 paper copies of the brief that are identical to the electronic version. 9th Cir. R. 31-1. Do not submit paper copies until directed to do so.

Excerpts of Record

The Court requires Excerpts of Record rather than an Appendix. 9th Cir. R. 30-1.1(a). Please review 9th Cir. R. 30-1.3 through 30-1.6 to see a list of the specific contents and format. For Excerpts that exceed 75 pages, the first volume must comply with 9th Cir. R. 30-1.6(a). Excerpts exceeding 300 pages must be filed in multiple volumes. 9th Cir. R. 30-1.6(a).

Appellees may file supplemental Excerpts and appellants may file further Excerpts. 9th Cir. R. 30-1.7 and 30-1.8. If you are an appellee responding to a pro se brief that did not come with Excerpts, then your Excerpts need only include the contents set out at 9th Cir. R. 30-1.7.

Excerpts must be submitted in PDF format in CM/ECF on the same day the filer submits the brief. The filer shall serve a paper copy of the Excerpts on any party not registered for CM/ECF.

If the Excerpts contain sealed materials, you must submit the sealed documents electronically in a separate volume in a separate transaction from the unsealed volumes, along with a motion to file under seal. 9th Cir. R. 27-13(e). Sealed filings must be served on all parties by mail, or if mutually agreed by email, rather than through CM/ECF noticing.

After electronic submission, the Court will direct the filer to file 4 separately-bound paper copies of the excerpts of record with white covers.

Mediation Program

Mediation Questionnaires are required in all civil appeals except cases in which the appellant is proceeding pro se, habeas cases (28 U.S.C. §§ 2241, 2254 and 2255) and petitions for writs (28 U.S.C. § 1651). 9th Cir. R. 3-4.

The Mediation Questionnaire is available on the Court's website at www.ca9.uscourts.gov under *Forms*. The Mediation Questionnaire should be filed within 7 days of the docketing of a civil appeal. The Mediation Questionnaire is used only to assess settlement potential.

If you are interested in requesting a conference with a mediator in any type of appeal, you may call the Mediation Unit at (415) 355-7900, email ca09_mediation@ca9.uscourts.gov or make a written request to the Chief Circuit Mediator. You may request conferences confidentially. More information about the Court's mediation program is available at http://www.ca9.uscourts.gov/mediation.

Oral Hearings

Approximately 14 weeks before a case is set for oral hearing, the parties are notified of the hearing dates and locations and are afforded 3 days from the date of those notices to inform the Court of any conflicts. Notices of the actual calendars are then distributed approximately 10 weeks before the hearing date.

The Court will change the date or location of an oral hearing only for good cause, and requests to continue a hearing filed within 14 days of the hearing will be granted only upon a showing of exceptional circumstances. 9th Cir. R. 34-2.

Oral hearing will be conducted in all cases unless all members of the panel agree that the decisional process would not be significantly aided by oral argument. Fed. R. App. P. 34(a)(2).

Oral arguments are live streamed to You Tube and can be accessed through the Court's website.

Ninth Circuit Appellate Lawyer Representatives
APPELLATE MENTORING PROGRAM

1. Purpose

The Appellate Mentoring Program is intended to provide mentoring on a voluntary basis to attorneys who are new to federal appellate practice or would benefit from guidance at the appellate level. In addition to general assistance regarding federal appellate practice, the project will provide special focus on two substantive areas of practice - immigration law and habeas corpus petitions. Mentors will be volunteers who have experience in immigration, habeas corpus, and/or appellate practice in general. The project is limited to counseled cases.

2. Coordination, recruitment of volunteer attorneys, disseminating information about the program, and requests for mentoring

Current or former Appellate Lawyer Representatives (ALRs) will serve as coordinators for the Appellate Mentoring Program. The coordinators will recruit volunteer attorneys with appellate expertise, particularly in the project's areas of focus, and will maintain a list of those volunteers. The coordinators will ask the volunteer attorneys to describe their particular strengths in terms of mentoring experience, substantive expertise, and appellate experience, and will maintain a record of this information as well.

The Court will include information about the Appellate Mentoring Program in the case opening materials sent to counsel and will post information about it on the Court's website. Where appropriate in specific cases, the Court may also suggest that counsel seek mentoring on a voluntary basis.

Counsel who desire mentoring should contact the court at mentoring@ca9.uscourts.gov, and staff will notify the program coordinators. The coordinators will match the counsel seeking mentoring with a mentor, taking into account the mentor's particular strengths.

3. The mentoring process

The extent of the mentor's guidance may vary depending on the nature of the case, the mentee's needs, and the mentor's availability. In general, the mentee should initiate contact with the mentor, and the mentee and mentor should determine

together how best to proceed. For example, the areas of guidance may range from basic questions about the mechanics of perfecting an appeal to more sophisticated matters such as effective research, how to access available resources, identification of issues, strategy, appellate motion practice, and feedback on writing.

4. Responsibility/liability statement

The mentee is solely responsible for handling the appeal and any other aspects of the client's case, including all decisions on whether to present an issue, how to present it in briefing and at oral argument, and how to counsel the client. By participating in the program, the mentee agrees that the mentor shall not be liable for any suggestions made. In all events, the mentee is deemed to waive and is estopped from asserting any claim for legal malpractice against the mentor.

The mentor's role is to provide guidance and feedback to the mentee. The mentor will not enter an appearance in the case and is not responsible for handling the case, including determining which issues to raise and how to present them and ensuring that the client is notified of proceedings in the case and receives appropriate counsel. The mentor accepts no professional liability for any advice given.

5. Confidentiality statement

The mentee alone will have contact with the client, and the mentee must maintain client confidences, as appropriate, with respect to non-public information.

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
Post Office Box 193939
San Francisco, California 94119-3939
415-355-8000

Molly C. Dwyer
Clerk of Court

December 14, 2017

No.: 17-17485
D.C. No.: 2:15-cv-00586-JKS
Short Title: Shane Peters v. Eric Arnold

Dear Appellant

A copy of your notice of appeal/petition has been received in the Clerk's office of the United States Court of Appeals for the Ninth Circuit. The U.S. Court of Appeals docket number shown above has been assigned to this case. You must indicate this Court of Appeals docket number whenever you communicate with this court regarding this case.

Please furnish this docket number immediately to the court reporter if you place an order, or have placed an order, for portions of the trial transcripts. The court reporter will need this docket number when communicating with this court.

The due dates for filing the parties' briefs and otherwise perfecting the appeal have been set by the enclosed "Time Schedule Order," pursuant to applicable FRAP rules. These dates can be extended only by court order. Failure of the appellant to comply with the time schedule order will result in automatic dismissal of the appeal. 9th Cir. R. 42-1.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 14 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

SHANE AUSTIN PETERS,

Petitioner - Appellant,

v.

ERIC ARNOLD, Acting Warden,

Respondent - Appellee.

No. 17-17485

D.C. No. 2:15-cv-00586-JKS
U.S. District Court for Eastern California, Sacramento

TIME SCHEDULE ORDER

The parties shall meet the following time schedule.

Mon., February 12, 2018	Appellant's opening brief and excerpts of record shall be served and filed pursuant to FRAP 32 and 9th Cir. R. 32-1.
Mon., March 12, 2018	Appellee's answering brief and excerpts of record shall be served and filed pursuant to FRAP 32 and 9th Cir. R. 32-1.

The optional appellant's reply brief shall be filed and served within 21 days of service of the appellee's brief, pursuant to FRAP 32 and 9th Cir. R. 32-1.

Failure of the appellant to comply with the Time Schedule Order will result in automatic dismissal of the appeal. See 9th Cir. R. 42-1.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Ruben Talavera
Deputy Clerk
Ninth Circuit Rule 27-7